

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: May 5, 2005

Resolution No. L-316

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER SERVICES DIVISION (UTILITIES SAFETY BRANCH) INVESTIGATION RECORDS PURSUANT TO PUBLIC RECORDS ACT REQUEST BY DANIEL P. POWELL ON BEHALF OF DANIEL EVARD, THE INJURED PARTY, AND BY STACEY C. POSEGATE, ON BEHALF OF THE PROPERTY OWNER, AND A DEPOSITION SUBPOENA FOR BUSINESS RECORDS FROM ROBERT E. SUTTLE, ON BEHALF OF SOUTHERN CALIFORNIA EDISON COMPANY, SEEKING DISCLOSURE OF COMMISSION STAFF INVESTIGATION RECORDS RELATING TO AN ACCIDENT INVOLVING DANIEL EVARD ON JANUARY 27, 2004 IN THE CITY OF YUCCA VALLEY, CALIFORNIA. (INCIDENT NO. E20040127-01).

BACKGROUND

A letter dated April 8, 2004, from the law firm of Thon, Beck & Vanni, representing the injured party, Daniel Evard, sought disclosure of Commission staff investigation records. On April 29, 2004, the Public Utilities Commission staff responded to the request by stating that disclosure of the investigative records was not possible pursuant to General Order 66-C, Part 2.1, and because the investigation was not yet completed. A similar request was made by the law firm of Haight, Brown & Bonesteel, and a Deposition Subpoena was served by Southern California Edison Company's attorney at the Law Offices of Don H. Zell. The investigation has now been completed and a report has been prepared by the Commission Staff.

The records requested address an accident that occurred on January 27, 2004. Daniel Evard was injured after he contacted an overhead electrical wire maintained by Southern California Edison Company with an aluminum pole while rotating a vinyl poster sign on a billboard located below the wire.

DISCUSSION

The reports requested are “public records” as defined by the California Public Records Act (PRA). (Government Code § 6250 et seq.) The California Constitution, PRA, and discovery law, favor disclosure of public records. The amendments to the California Constitution made by the recently enacted Proposition 59 elevate to a constitutional level the public’s right to access government information. (California Constitution, Article 1, § 3 (a).) While these amendments expressly preserve existing privileges and exemptions against disclosure of government records, they also impose new rules of statutory construction. Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people’s right of access, and narrowly construed if they limit the right of access. (California Constitution, Article 1, § 3 (b)(2).) Finally, these amendments require that any new statutes, court rules, or other authority that limits the right of access be adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest. (Id.)

The PRA provides that a justification for withholding a public record in response to a PRA request must be found either among the specified exemptions listed in the Act, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.¹

A justification for withholding records in response to a subpoena must be based upon a statutory prohibition or privilege against disclosure. (Evidence Code § 911). PRA exemptions have no impact on discovery. (Government Code § 6260.) Commission decisions regarding disclosure of public records must be consistent with the PRA and relevant discovery law.

The Commission has exercised its discretion under Public Utilities Code § 583, and implemented its responsibility under Government Code § 6253.4 (a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order 66-C. General Order 66-C § 1.1 provides that Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule.” General Order 66-C, § 2.2 (a) provides the most relevant exemption from mandatory disclosure under the PRA in this instance. Section 2.2 precludes staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.” Section 2.2(a) covers records provided by SCE to Commission staff

¹ The fact that records may fall within a PRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records which may not be disclosed by law, PRA exemptions are discretionary, rather than mandatory, and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. See Government Code §6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App.3d 645, 656.

confidentially in the course of its investigation, as well as Commission records containing this confidential information.

General Order 66-C § 2.2(a) limits staff's ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure. For this reason, staff denies most initial requests seeking Commission investigation records. Such a denial usually notes the option under General Order 66-C § 3.4 to appeal to the Commission for disclosure of the records. If an appeal is received, staff prepares a draft resolution for the Commission's consideration.

There is no statute specifically forbidding the disclosure of the Commission's safety investigation records. However, portions of such records may be subject to disclosure limitations in the Information Practices Act (IPA) (Civil Code § 1798 et seq.). The IPA limits state agency disclosure of "personal information," defined as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters and medical or employment history. It includes statements made by, or attributed to, the individual." The IPA authorizes disclosure of personal information in a number of circumstances, including, most relevant to the Commission's response to this subpoena: "(a) To the individual to whom it pertains; (b) With the prior written voluntary consent of the person to whom the information pertains ...; (c) To ... a person representing the individual provided that it can be proved with reasonable certainty ... that such person is the authorized representative ...; (g) Pursuant to the California Public Records Act ...; and (g) To any person pursuant to a subpoena, court order, or other compulsory legal process if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law...."

The portions of Commission safety incident investigations subject to the IPA primarily include information concerning the individual or individuals killed or injured in the incident giving rise to the safety investigation, and the identity of and any statements made by witnesses to the incident who are identified in the records. In this particular case, the individuals identified in the investigation records include the individual injured in the incident, two representatives of the utility whose facilities were involved in the incident and who are identified as witnesses in the draft incident investigation report, an additional contact person from the utility, one additional witness, and the Commission staff involved in the incident investigation.

The records of the incident at issue have been subpoenaed by lawyers for Edison, and are also subject to two PRA requests, one submitted by a lawyer representing the individual injured in the incident, and the other submitted by the lawyer for the owner of the billboard upon which the injured individual was working. Disclosure of personal information concerning the injured individual in response to the PRA request by the

individual's lawyer is authorized by the IPA since disclosure would be with the written consent of the individual, to a representative of that individual, and in response to a PRA request.² Similarly, disclosure of the identities and statements made by Edison's employees in response to the two PRA requests is permitted, since the IPA authorizes disclosure in response to PRA requests. Further, disclosure pursuant to Edison's subpoena is permitted since the IPA authorizes disclosure in response to subpoenas if, before, disclosure, the agency makes reasonable efforts to notify the individual to whom the record pertains. Commission staff spoke with Edison's lawyers, and with one of the individuals identified in staff's report on the incident at issue, providing reasonable notice of the subpoena and the possibility that information will be disclosed. Commission disclosure of the identity and comments of its own staff in response to a PRA request or subpoena is also authorized by the IPA. Circulation of this draft resolution provides additional notice. Disclosure of the personal information in the incident investigation records at issue in response to the current subpoena and records requests is consistent with the IPA.

During the past ten years the Commission has ordered disclosure of records concerning completed safety incident investigations on numerous occasions. The Commission has found that disclosure of such records will not interfere with the Commission's investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the accident/incident under investigation.³ Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility incidents (accidents), the families of such individuals, the legal representatives of such individuals or families, or the legal representatives of a defendant, or potential defendant, in litigation related to an accident/incident.

The Commission has found that Public Utilities Code § 315, which expressly prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property," offers utilities sufficient protection against injury caused by the release of requested investigation records.

² Further, in most situations the Information Practices Act provides individuals with a right to access all personal information in any record containing personal information maintained by reference to an identifying particular assigned to the individual. (Civil Code § 1798.34.)

³ See, e.g. Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.90-05-020 (1993), 49 CPUC 2d 241; L-248 *Re Lopez 1* (April 26, 1995); L-249 (August 11, 1995); L-255 *Re Murrillo* (1997); L-257 *Re Johnson* (1997); L-260 *Re Banda* (1997); L-262 *Re Peralta and Boyadjian* (1997); L-263 *Re Schwab* (1997); L-265 *Re Johnson 2* (1998); L-271 *Re City of Pinole* (1998); L-272 *Re Johnson 3* (1998); L-273 *Re Disney* (1998); L-275 *Re Lopez* (1998); L-278 *Re Turner* (1999); L-279 *Re Rodriguez* (1999); L-280 *Re Kimball* (1999); L-286 *Re EBMUD* (1999); L-289 *Re Cornelius* (2000); L-290 *Re Grady Plumbing* (2000); L-291 *Re Morales* (2001); L-292 *Re White* (2001); L-295 *Re Maldonado-Colin* (2001); L-297 *Re Kuno's Grading* (2002); L-298 *Re Wilson* (2002); and L-300 *Re Teegardin* (2002).

If safety incident reports filed by utilities with the Commission, or records of an investigation completed by Commission staff, contain any confidential personal information, or other privileged or exempt information, the redaction of which is permitted by law, such information need not be disclosed. No information in the current incident investigation file requires redaction.

COMMENTS ON DRAFT RESOLUTION:

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on April 5, 2005, in accordance with PU Code § 311(g). No comments were received.

FINDINGS OF FACT

1. The Commission initially received a letter dated April 8, 2004, seeking disclosure of Commission staff investigation records, from the law firm of Thon, Beck & Vanni, representing Daniel Evard, the injured party. A similar request was made by the law firm of Haight, Brown & Bonesteel, and a Deposition Subpoena was served by Southern California Edison Company's attorney at the Law Offices of Don H. Zell. The records requested address an accident that occurred on January 27, 2004. Daniel Evard was injured after he contacted an overhead electrical wire maintained by Southern California Edison Company with an aluminum pole while rotating a vinyl poster sign on a billboard located below the wire.
2. The Commission's investigation of the January 27, 2004 accident has been closed, and, therefore the disclosure of the investigation records compiled by the Commission would not compromise the investigation.
3. The public interest favors disclosure of the requested investigation records.

CONCLUSIONS OF LAW

1. The documents in the requested investigation file and report are public records as defined by Government Code § 6250 et seq.
2. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. Furthermore, the California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules,

and other authority limiting disclosure be construed narrowly; and by requiring that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. California Constitution, Article 1, Section 3 (b)(1) and (2).

3. The general policy of the California Public Records Act favors disclosure of records.
4. Justification for withholding a public record in response to a Public Records Act request must be based on specific exemptions in the Public Records Act or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Government Code § 6255.)
5. Justification for withholding a public record in response to a subpoena or other discovery procedure must be based upon a statutory prohibition or a privilege against disclosure, since Public Records Act exemptions do not apply to discovery. (Evidence Code § 911; Government Code § 6260.)
6. The Commission has exercised its discretion under Public Utilities Code § 583 to limit staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. (General Order 66-C § 2.2 (a).)
7. Public Utilities Code § 583 does not limit the Commission's ability to order disclosure of records.

ORDER

1. The request for disclosure of the Commission's records concerning the investigation of an accident that occurred on January 27, 2004, when Daniel Evard was injured after he contacted an overhead electrical wire maintained by Southern California Edison Company, is granted.
2. The effective date of this order is today.

///

///

///

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of May 5, 2005 and that the following Commissioners approved it:

STEPHEN LARSON
Executive Director